Caterair International *and* Chauffeurs, Sales Drivers, Warehousemen & Helpers, Local 572, International Brotherhood of Teamsters, AFL–CIO. Case 31–CA–18702

August 27, 1996

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING, COHEN, AND FOX

This case, on remand from the United States Court of Appeals for the District of Columbia Circuit, presents the issue of whether an affirmative bargaining order is the appropriate remedy for an employer's unlawful withdrawal of recognition and refusal to bargain with an incumbent union. The Board's original decision, reported at 309 NLRB 869 (1992), affirmed an administrative law judge's findings that the Respondent violated Section 8(a)(1), (3), and (5) of the Act. The Board also adopted the judge's recommended Order, including provisions requiring both that the Respondent cease and desist from its unlawful refusal to bargain and that it affirmatively recognize and bargain with the Union.

The Respondent filed a petition for review with the court of appeals, and the Board filed a cross-petition for enforcement of its Order. On April 29, 1994, the court affirmed the Board's unfair labor practice findings and conclusions and enforced the remedial order with the exception of the affirmative provision requiring the Respondent to recognize and bargain with the Union. The court remanded the case to the Board to explain why the affirmative bargaining order, with its implicit bar on decertification efforts for a reasonable period of time, was necessary. *Caterair International v. NLRB*, 22 F.3d 1114, cert. denied 115 S.Ct. 575 (1994).

On March 13, 1995, the Board held oral argument in this case and in *Lee Lumber and Building Material Corp.*, Case 13–CA–29377. In this case, the Board posed two questions for argument:

> Under what circumstances is it appropriate for the Board to issue an affirmative bargaining order, with its attendant decertification bar for a "reasonable period," rather than only a cease-and-desist order, to remedy an unlawful withdrawal of recognition from an incumbent union?
>
> Assuming arguendo that it is appropriate for the Board to enter an affirmative bargaining order, what are the relevant considerations for determining the "reasonable period"?[1]

The parties in each case, as well as amici curiae American Federation of Labor and Congress of Industrial Organizations and Council on Labor Law Equality, presented oral argument before the Board. The parties and the amici have filed statements of position and briefs.

The Board has accepted the court's remand. We have considered the Board's original decision in light of the court's opinion, briefs and statements subsequently filed by the parties and amici, and the oral argument. For the reasons that follow, we reaffirm our longstanding policy that an affirmative bargaining order is the standard appropriate remedy for the restoration of the status quo after an employer's unlawful withdrawal of recognition from an incumbent union and subsequent refusal to bargain. Furthermore, having once considered and balanced the critical statutory policies and rights relevant to this remedy, we find no need to engage in a case-by-case factual analysis to justify its imposition. Finally, we shall adhere to our traditional multifactor test for determining the "reasonable period of time" for protected bargaining in each case.

Our resolution of the remanded issue involves an exercise of the remedial authority vested in the Board by Congress through Section 10(c) of the Act. It is well established that "the remedial power of the Board is a 'broad discretionary one, subject to limited judicial review.'" *NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262–263 (1969) (quoting *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 216 (1964)). We believe that the remedial policy at issue represents a reasonable exercise of our statutory authority and would warrant Federal judicial deference under traditional standards. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *National Treasury Employees Union v. FLRA*, 910 F.2d 964 (D.C. Cir. 1990); and see generally *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

As the court noted in its decision, this is not the first time that it has criticized the Board, in a case involving an unlawful refusal to bargain with an incumbent union, for failing to provide an explanation of the need for an affirmative bargaining order. See *Sullivan Industries v. NLRB*, 957 F.2d 890, 904 (D.C. Cir. 1992); *Williams Enterprises v. NLRB*, 956 F.2d 1226, 1232 (D.C. Cir. 1992); *Avecor, Inc. v. NLRB*, 931 F.2d 924, 928 (D.C. Cir. 1991); *St. Agnes Medical Ctr. v. NLRB*, 871 F.2d 137, 144 (D.C. Cir. 1989); *Peoples Gas System v. NLRB*, 629 F.2d 35, 45 (D.C. Cir. 1980).[2] The point which concerns the D.C. Circuit is a perceived inequity in barring employees from challenging contin-

[1] Although the court's opinion did not expressly direct the Board to address this second issue, we find that it is relevant to our consideration of the remedial policy in dispute.

[2] See also *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243 (D.C. Cir. 1994), a decision issued subsequent to the court's decision in the instant case.

ued representation by an incumbent union because their employer has unlawfully withdrawn recognition.

The court has frequently referred to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), in characterizing the affirmative bargaining order as an extreme remedy that the Board must justify on a case-by-case basis by deciding whether the effects of unfair labor practices preclude the possibility of a fair representation election. On the other hand, at least in the present case, the court has also stressed a significant factual distinction between the situation addressed in *Gissel*, where the employer wrongfully obstructed employees' initial organizing efforts, and the situation here involving withdrawal of recognition from an incumbent majority union. The former situation presents only the remedial alternatives of (1) traditional remedies including a cease-and-desist order prohibiting the employer from obstructing the employees' organizing efforts coupled with the prospect of a representation election or, (2) in limited cases where an election cannot fairly be held, an affirmative bargaining order. The incumbent situation presents another alternative. The court spoke of a "sound third option" to order the employer to cease and desist from its unlawful conduct—in which case it will have to recognize and bargain with the incumbent on request—while preserving the statutory rights of employees to challenge the incumbent through the decertification election process.

In *Williams Enterprises*, 312 NLRB 937, 940 (1993) (*Williams II*), the Board responded to a remand from the D.C. Circuit and reaffirmed its original order[3] with a full explanation of the necessity for an affirmative bargaining order in addition to a cease-and-desist order. Although *Williams II* involved the imposition of an affirmative bargaining obligation on a successor employer, the rationale for doing so applies with equal force to an employer that has wrongfully refused to bargain with and withdrawn recognition from an incumbent union. We shall reaffirm and expand on this rationale in responding to the court's remand here.[4]

As stated in *Williams II*, an affirmative bargaining order has been the standard Board remedy for more than 50 years when an employer has refused to bargain with an incumbent Section 9(a) union.[5] While longevity of use does not by itself validate our remedial choice, nothing in the extensive collective administrative experience of this Agency has signaled that this choice has ill-served, or that a different remedial policy would better serve, the twin statutory policies of promoting industrial stability and ensuring employee free choice in selecting or rejecting a collective-bargaining representative. Indeed, that experience confirms our view that a bargaining order is routinely appropriate even when the incumbent union has lost its majority support after the employer's unfair labor practice, and even though the order will, for a reasonable period, preclude a decertification election to test the union's majority status.

Williams II set forth the following reasons for this longstanding policy:

> In such cases, the Board's paramount concerns are to restore to the union the bargaining opportunity which it should have had in the absence of unlawful conduct and to prevent the possibility that the wrongdoing employer would ultimately escape its bargaining obligation as the result of the predictably adverse effects of its unlawful conduct on employee support for the union.[6]

Williams II further emphasized that the Supreme Court has twice explicitly endorsed the Board's use of affirmative bargaining orders when an employer has unlawfully refused to bargain with a majority bargaining representative. See *NLRB v. P. Lorillard Co.*, 314 U.S. 512 (1942), and *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944).

In *Franks Bros.*, the Supreme Court expressly agreed with the Board that an affirmative bargaining order is an appropriate remedy even if a union has lost majority support since the unlawful refusal to bargain. The Supreme Court stated:

> Out of its wide experience, the Board many times has expressed the view that the unlawful refusal of an employer to bargain collectively with its employees' chosen representative disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions. The Board's study of this problem has led it to conclude that, for these reasons, a requirement that union membership be kept intact during delays incident to hearings would result in permitting employers to profit from their own wrongful refusal to bargain.

321 U.S. at 704 (citations omitted). The Supreme Court noted that the Board "might well think" that a remedy requiring the employer to bargain with the union which represented a majority of the employees at the time of the wrongful refusal to bargain was the

[3] *Williams Enterprises*, 301 NLRB 167 (1991) (*Williams I*).

[4] The Fourth Circuit enforced the Board's Order in *Williams II*. *NLRB v. Williams Enterprises, Inc.*, 50 F.3d 1280 (4th Cir. 1995). Although the Board's decision issued prior to the D.C. Circuit's decision in the present case, it is apparent that the General Counsel did not refer to *Williams II* and the court did not independently consider that case in reaching its decision. But see *Exxel/Atmos, Inc. v. NLRB*, 37 F.3d 1538 (D.C. Cir. 1994), a per curiam denial of rehearing of 28 F.3d 1243 (D.C. Cir. 1994) regarding the same issue with a dissenting opinion from Judge Silberman quoting at length from the Board's opinion in *Williams II*.

[5] See, e.g., *Inland Steel Co.*, 9 NLRB 783, 814–816 (1938).

[6] 312 NLRB at 940.

only way to expunge the effect of the employer's unfair labor practice, for otherwise

> recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation. In the Board's view, procedural delays necessary fairly to determine charges of unfair labor practices might in this way be made the occasion for further procedural delays in connection with repeated requests for elections, thus providing employers a chance to profit from a stubborn refusal to abide by the law. *That the Board was within its statutory authority in adopting the remedy which it has adopted to foreclose the probability of such frustrations of the Act seems too plain for anything but statement.* [Id. at 705 (emphasis added).]

Notably, the Board decision approved by the Supreme Court in *Franks Bros.* did not rely on particular factual circumstances to justify the imposition of an affirmative bargaining order. See *Franks Bros. Co.*, 44 NLRB 898 (1942). The Board stated instead that "[w]e have consistently held that the only means by which a refusal to bargain can be remedied is an affirmative order requiring the employer to bargain with the Union which represented a majority at the time the unfair labor practice was committed." Id. at 917 fn. 24 (citations omitted). The Supreme Court endorsed this remedy and the rationale for it, again without reference to the circumstances of the case.[7] Indeed, the Supreme Court observed, "Little need be added to what has been said on this subject in other cases." 321 U.S. at 704.

The Supreme Court also dismissed any suggestion that a bargaining order entailed an "injustice to employees" who might prefer a different union or no union:

> [A] Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to new situations that may develop . . . . But, as the *remedy here in question recognizes, a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed* . . . . After such a reasonable period the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships. [Id. at 705–706 (citations omitted; emphasis added).]

Nothing in the Supreme Court's subsequent *Gissel* opinion indicates an intent to limit the broad affirmation of Board remedial policy in *Franks Bros.* or *Lorillard.*[8] In *Gissel*, and in the other cases consolidated with it for Supreme Court review, the employers could lawfully have refused to recognize the organizing union as long as they did not engage in unfair labor practices precluding the possibility of an election. The unlawful refusal to bargain in this case presents a different remedial question. As the Fourth Circuit observed in enforcing the Board's order in *Williams II*:

> The distinction between incumbent unions and non-incumbent unions is significant. An incumbent union enjoys a presumption of majority status which burdens the . . . company with an obligation to recognize and bargain with it. Thus, when a . . . company refuses to recognize or bargain with an incumbent union, only an affirmative bargaining order can restore the status quo ante—that is, reseat the union as the incumbent and restore to it the bargaining opportunity it would have had but for the successor's unlawful refusal to bargain. *Franks Bros.*, 321 U.S. at 705; *Ron Tirapelli Ford, Inc. v. NLRB*, 987 F.2d 433, 445 (7th Cir. 1993) ("a bargaining order is the appropriate remedy to return the parties to the status quo ante"). In contrast, a non-incumbent union never enjoyed a presumption of majority status; therefore, an affirmative order to bargain with a nonincumbent union grants it a better position than the status quo—initial recognition as the bargaining agent which it would not have had even before the company's unlawful conduct.[9]

The D.C. Circuit has acknowledged that "deterrence and industrial stability emerge as important considerations" when an employer has unlawfully withdrawn recognition from an incumbent union. *Peoples Gas System v. NLRB*, 629 F.2d 35, 46 fn. 23 (1980). It has

[7] We recognize that *Franks Bros.* involved a refusal to recognize a union that had never been recognized by the employer, while the instant case involves a refusal to recognize a union that had been previously recognized by the employer. However, in both cases, the refusal to recognize, standing alone, was unlawful, and there is a need to afford remedial protection to a union that would have functioned as an incumbent bargaining representative but for the unlawful refusal to recognize. Thus, we believe that the rationale of *Franks Bros.* applies with equal force to both cases.

[8] Indeed, *Gissel* specifically affirms this Board remedial policy by rejecting (again) the argument that a bargaining order is unfair to employees who oppose the union. The Court pointed out that "[t]here is, after all nothing permanent in a bargaining order and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition." 395 U.S. at 613. See also *NLRB v. Williams Enterprises*, 50 F.3d at 1290, where the Fourth Circuit stated that even though an affirmative bargaining order "infringes upon" and "restricts employees' freedom of choice," such "a restriction does not . . . render the remedy inappropriate," because "[i]t does not fix a permanent bargaining relationship between the employer and the union" and "[a]fter a reasonable period, the employees will be free to reject the union, if they so choose . . . ."

[9] *NLRB v. Williams Enterprises, Inc.*, 50 F.3d at 1289.

nevertheless directed the Board to explain why such considerations outweigh the need to protect the free choice of employees who may wish to decertify the union immediately. According to the court's opinion in *Peoples Gas*, the policy of routinely requiring affirmative bargaining, with its bar of decertification efforts for a reasonable period, "gives too much weight to the interests of the Union, too little to the statutory rights of employees, and rests too much on speculation." Id. at 48.[10]

We do not regard the remedial issue presented as involving a balancing of the interests of the union against the statutory rights of employees. An affirmative bargaining order certainly serves the interests of an incumbent union by restoring "the bargaining opportunity which it should have had in the absence of unlawful conduct."[11] (Of course, permitting an immediate decertification effort would serve the interests of a wrongdoing employer.) The Board's design in restoring the union's bargaining opportunity, however, is to protect the statutory rights of employees, including the right of free choice of representation, not to protect any independent right of the union.

In particular, the affirmative bargaining order protects the rights of an employee majority who have previously expressed the desire to bargain collectively through that union. This antecedent exercise of employees' Section 7 rights is a concrete fact in every case in which the Board imposes an affirmative remedial order to bargain with an incumbent union. The existence of uncoerced employee opposition to the union is not. In such circumstances, we respectfully submit that the court's "third option" would unfairly jeopardize employees' statutory rights by exposing their majority choice of collective-bargaining representation to a referendum in the immediate wake of their employer's unlawful refusal to bargain and subsequent, often protracted, litigation resulting from this misconduct. In our view, such a result would disserve, rather than serve, the goal of enabling employees freely to select or reject a bargaining representative.

Furthermore, the court seems to ignore that the refusal to bargain and 8(a)(5) litigation has itself been a test of the incumbent union's representative status, albeit not through the preferred method of a Board election. If the union had prevailed in a decertification election, it (and the employee majority who supported it) would be entitled to a full year of protected good-faith bargaining prior to any new test of representation. *Americare-New Lexington Health Care Center*, 316 NLRB 1226 (1995).[12] If the parties had resolved the 8(a)(5) issue through a settlement agreement, there could be no valid question concerning representation raised until a reasonable period of time for bargaining had passed after the settlement agreement. *Poole Foundry & Machine Co.*, 95 NLRB 34 (1951), enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952).[13] We do not see why an adjudicated finding of a Section 8(a)(5) violation should result in any less protection of employees' choice to bargain through an incumbent representative.

We need not focus exclusively on the rights of those who previously supported the union to justify our choice of remedy. As the Board stated long ago,

> Employees join unions in order to secure collective bargaining. Whether or not the employer bargains with a union is normally decisive of its ability to secure and retain its members. Consequently, the result of an unremedied refusal to bargain with a union, standing alone, is to discredit the organization in the eyes of the employees, to drive them to a second choice, or to persuade them to abandon collective bargaining altogether.[14]

Regardless of how long a bargaining relationship may have previously endured, an unlawful refusal to bargain deprives all unit employees, whether or not predisposed to support the process of collective bargaining through a union, of a fair opportunity to assess what their particular 9(a) representative can still accomplish for them through that process. A reasonable period of time for bargaining insulated from decertification efforts restores that opportunity. By so doing, this remedy better serves employee free choice than would a remedy permitting an immediate electoral challenge.

[10] The D.C. Circuit's criticism of the Board's remedial policy contrasts sharply with the same court's observation in a per curiam opinion issued a month after *Peoples Gas*. In *NLRB v. Maywood Plant of Grede Plastics*, 628 F.2d 1, 6 (D.C. Cir. 1980), the court stated:

> Ordinarily, the remedy for a company's refusal to bargain with an already authorized employee representative is an order directing the company to meet and bargain in good faith . . . . Such a bargaining order is, accordingly, the customary remedy when the employer's refusal to bargain is incident to its decertification campaign. [Citations and fn. omitted.]

We note that the court in the present case has affirmed the Board's finding of a 8(a)(5) violation based on evidence of pervasive management influence in a decertification effort. The court did not refer to *Grede Plastics* in directing the Board to explain its choice of "the customary remedy" for the violation at issue.

[11] *Williams II*, 312 NLRB at 940.

[12] Member Cohen dissented in Americare. He distinguishes between an incumbent union that has been subjected to an unlawful refusal to bargain, and an incumbent which has not been subjected to that conduct and which has won a decertification election. He would extend an insulated period of protection in the former case, but sees no need to do so in the latter.

[13] The D.C. Circuit approved the reasoning of Poole in *NLRB v. Stant Lithograph, Inc.*, 297 F.2d 782 (111 U.S.App.D.C. 371, 1961).

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Admittedly, there may be employees in any refusal to bargain case who are opposed to the union and whose opposition to collective-bargaining representation is unrelated to the employer's misconduct and will not be altered by anything that happens during the insulated remedial bargaining period. Our remedial policy temporarily limits their free choice. On balance, however, we share the view of the Fourth Circuit in *Williams II* that "the limit on employees' freedom of choice, while not inconsequential, is relatively minor compared to the potential harm from a premature decertification election." 50 F.3d at 1290.

In sum, we are concerned that the remedial policy suggested by the D.C. Circuit gives "too little [weight] to the statutory rights of employees, and rests too much on speculation"[15] about the emergence of a genuine question concerning continued collective-bargaining representation during the insulated bargaining period. For the reasons set forth here and in *Williams II*, we shall adhere to the policy that an affirmative bargaining order is the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees.

We shall also adhere to existing policy with respect to those factors defining the reasonable period of time for bargaining. In situations involving Board orders, settlement agreements, and voluntary recognition,

> [t]he test for determining what is and what is not a reasonable period of time "is what transpires during the time period under scrutiny rather than the length of time elapsed . . . ." The Board has considered various factors in determining what is a reasonable period of time. Among those are whether the parties are bargaining for a first contract; whether the employer engaged in meaningful good-faith negotiations over a substantial period of time; and whether an impasse in negotiations had been reached.[16]

In applying this multifactor standard, the Board has found a reasonable bargaining period to encompass as few as 4 months and as much as a full year of good-faith bargaining. See, e.g., cases cited in *NLRB v. Williams Enterprises, Inc.*, 50 F.3d at 1290. We believe that the flexibility of such a standard is preferable to a remedial bargaining period of fixed duration. By emphasizing that the duration of insulated bargaining depends primarily on what transpires during bargaining, the policy encourages parties to attend to the bargaining process, not to the calendar. On the other hand, the possibility that a remedial requirement of a reasonable bargaining period may be met with only a few months of good-faith bargaining lessens the limiting effect of this remedy on employee free choice.

ORDER

The National Labor Relations Board reaffirms its original Order, reported at 309 NLRB 869 (1992), and orders that the Respondent, Caterair International, its officers, agents, successors, and assigns, shall take the action set forth in that Order.

[15] *Peoples Gas v. NLRB*, 629 F.2d at 48.

[16] *King Soopers, Inc.*, 295 NLRB 35, 37 (1989) (fns. omitted). It may also be appropriate in a particular case to consider the severity of any other unfair labor practices involved or the length of the bargaining hiatus resulting from the unlawful refusal to bargain.